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# In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71–83

LT. JOHN A. STRAIT, PETITIONER

*v.*

HON. MELVIN A. LAIRD, SECRETARY OF DEFENSE, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS

### OPINIONS BELOW

The opinion of the court of appeals on rehearing (App. 71–74) is reported at 445 F. 2d 843. The court of appeals' initial opinion (App. 59–70) is not officially reported, and is unofficially reported at 3 SSLR 3784.

### JURISDICTION

The judgment of the court of appeals on rehearing was entered on June 4, 1971. The petition for a writ of certiorari was filed on July 15, 1971, and was granted on November 16, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether at the request of a non-unit reservist who resides within the judicial district of the issuing court, a district court has jurisdiction to issue a writ of habeas corpus against the reservist's commanding officer located outside the court's territorial jurisdiction.

2. Whether, in the circumstances of this case, the district court has jurisdiction to review the Army's administrative denial of the reservist's conscientious objector claim under the mandamus provisions of 28 U.S.C. 1361 or under other statutes.

## STATUTES AND REGULATIONS INVOLVED

The pertinent statutory provisions and regulations are set forth in the Appendix, *infra*, pp. 39–61.

## STATEMENT

Petitioner brought this action in the United States District Court for the Northern District of California for review of the Army's administrative determination that he is not entitled to a discharge as a conscientious objector. The district court held that it had jurisdiction to consider this matter, but denied petitioner's claim on the merits. Initially the court of appeals sustained the district court's ruling concerning jurisdiction, and reversed the court's decision on the merits. On rehearing, the court of appeals held that the district court lacked jurisdiction to entertain petitioner's suit, and remanded the case with instructions to dismiss.

1. Petitioner was commissioned a Second Lieutenant in the Military Police Corps of the United States Army Reserve in June 1966, after successfully completing the Army Reserve Officer Training Course at the University of California. His participation in the reserve program made him an obligated volunteer officer, with an active duty commitment of two years. He was permitted to defer his active duty obligation, however, in order to pursue a course of studies at Yale University Law School.[1]

As a reserve officer with a deferred active duty obligation, petitioner was assigned to the United States Army Reserve Components Personnel Center ("RCPC"), Fort Benjamin Harrison, Indianapolis, Indiana.[2] Like other deferred service reserve officers, he was not attached to a specific reserve unit during the delay in active service, and was not required to attend monthly drills or summer encampments. All matters pertaining to him were handled by the RCPC.

Upon graduation from law school in June 1969, petitioner returned to California to take the California bar examination. He requested, and received, a further deferment from active duty for this purpose.

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[1] AR 601–25 (December 15, 1967, as amended), set forth in relevant part in the Appendix, *infra*, pp. 42–61, "prescribes policies, criteria, and procedures governing the delay in reporting for active duty * * * for members of the * * * Army Reserve (USAR)." Petitioner's active duty commitment was deferred under this regulation, which also governed his supervision in deferred status.

[2] In March 1971, the Center at Fort Benjamin Harrison, Indiana, was merged with the larger Army Reserve Components Personnel and Administration Center in St. Louis, Missouri.

On June 7, 1969, shortly after graduation from law school, petitioner accepted a promotion to First Lieutenant. During the summer he was processed in preparation for active duty, and, on July 9, 1969, was notified to report to Fort Gordon, Georgia, on February 9, 1970, to fulfill his two-year active duty commitment. On July 18, 1969, he took a medical examination and was found physically fit to enter active duty. The reporting date was later changed to April 13, 1970, to permit petitioner to retake the bar examination. During this entire period he remained in a deferred reserve status, assigned to RCPC.

On January 20, 1970, petitioner applied for a discharge from the Army as a conscientious objector. The application was submitted to and processed by the RCPC at Fort Benjamin Harrison, in Indiana, under applicable Army regulations.[3]

At the request of RCPC officials, interviews and hearings in processing the application were conducted at Fort Ord, California, and the results were forwarded to the Conscientious Objector Discharge Review

[3] In 1962 the Department of Defense promulgated regulations establishing an elaborate administrative review machinery for processing in-service conscientious objector claims. The present regulations are set forth in Department of Defense (DOD) Directive No. 1300.6 (May 10, 1968). The various branches of the Armed Services have issued regulations incorporating the provisions of DOD 1300.6 for processing particular servicemen under their respective jurisdictions; the Army has a separate regulation (AR 135-25 (September 2, 1970)), which "prescribes policies, criteria, and procedures governing the disposition of Reserve members of the Army who claim to be conscientious objectors." Petitioner's application was processed in accordance with this regulation.

Board at Fort Benjamin Harrison (AR 135–25, paras. 7c, 7h). The Board recommended that the application for discharge be disapproved, and on April 7, 1970, the RCPC Commander, Colonel John H. Hoffman, denied the application. The Army notified petitioner of the decision and confirmed that he was to report at Fort Gordon for active duty, as previously ordered, on April 13, 1970.

2. On April 9, 1970, petitioner initiated this action in the United States District Court for the Northern District of California. The complaint claimed various jurisdictional bases,[4] asserted that the denial of the conscientious objector discharge application "was wrongful and without basis in fact", and requested temporary and permanent relief, including discharge of petitioner from the Army (App. 4–17). The Secretary of Defense, the Secretary of the Army, and the commanding generals of the Sixth United States Army and of Fort Ord, California, and, by a later amendment, the RCPC commanding officer at Fort Benjamin Harrison, were named as respondents (App. 12, 16, 37–38), with the allegation that they were "the respective authorities who are unlawfully restraining the liberty of petitioner and should be required to

[4] The original complaint stated that jurisdiction was based, *inter alia*, on "the laws pertaining to jurisdiction of the court to issue a writ of habeas corpus (28 U.S.C. Sec. 2241(a)), * * * [and on the federal question jurisdiction] under 28 U.S.C. Sec. 1331(a) et seq. * * * " (App. 4). An amended complaint added as jurisdictional bases "the laws pertaining to an action in the nature of mandamus (28 U.S.C. Section 1361)" and "the Administrative Procedure Act (5 U.S.C. Sections 701–703, *et seq.*)" (App. 33; see *id.* at 34).

discharge petitioner [from the Army] as a conscientious objector pursuant to AR 135–25" (App. 35).

In response to an order to show cause (App. 30), the goverment asserted that the district court lacked jurisdiction, because, given his assignment to the Reserve Component Personnel Center at Fort Benjamin Harrison, in Indiana, petitioner was not in custody in the district nor was his custodian in the district. The court held, on the authority of *Donigian* v. *Laird*, 308 F. Supp. 449 (D. Md.), that petitioner was in the custody of the Army within its judicial district, and that the proper respondent was the RCPC commanding officer at Fort Benjamin Harrison, over whom the court could assert jurisdiction pursuant to 28 U.S.C. 1391 (e) (App. 52–53). The court subsequently ruled against petitioner on the merits.

The court of appeals originally affirmed the finding of habeas corpus jurisdiction and reversed the district court's decision on the merits (App. 59–70). On rehearing (App. 71–74), the court held that the intervening decision of *Schlanger* v. *Seamans*, 401 U.S. 487, compelled the conclusion that the district court lacked habeas corpus jurisdiction (App. 73):

> "Even if we concede that [petitioner] is in custody within the jurisdiction of the District Court * * *, his custodian—the commander of the Reserve Components Personnel Center at Fort Benjamin Harrison—remains outside the jurisdiction of that court. As stated in *Schlanger:* 'Hence, even if we assume that petitioner is "in custody" in Arizona in the sense that he is subject to military orders and control

> which act as a restraint on his movement * * * the absence of his custodian is fatal to the jurisdiction of the Arizona District Court.'"

Nor, the court concluded, contrary to petitioner's claim on rehearing, was mandamus appropriate since "the mandamus remedy would not afford complete relief," and since petitioner "may obtain relief by habeas corpus in the federal courts in Indiana, [and thus] there exists another adequate remedy" (App. 73, 74).[5] Remanding the case to the district court with directions to dismiss for want of jurisdiction, the court rejected without comment petitioner's arguments that jurisdiction would be appropriate under 28 U.S.C. 1331(a) (general federal question jurisdiction) or under the Administrative Procedure Act.

## SUMMARY OF ARGUMENT

The jurisdictional question in this case concerns which federal court can hear a challenge by an unattached, non-unit Army reservist to the denial by the military of his claim to conscientious objector status. There is no dispute that such an administrative determination is subject to judicial review. The controversy rather is over which district court can properly undertake such review.

## I

The issue with respect to habeas corpus jurisdiction is whether there is a proper respondent custodian

[5] The court indicated that while, unlike the situation with respect to habeas corpus, the district court did not lack mandamus jurisdiction (App. 74, n. 2), that remedy was not proper as a matter of "sound discretion" (App. 73).

within the territory of the California district court. As this Court's recent decision in *Schlanger* v. *Seamans* makes clear, the physical presence of a custodian within the court's district is an essential element for habeas corpus; the absence of this requirement "is fatal to the [habeas corpus] jurisdiction" of the court (401 U.S. 487, 491).

In the instant case, this requirement is not met. Neither of the California commanders named as respondents had custody or control over petitioner during the period in question. The remaining respondents are officially resident outside the territory of the district court. This is precisely the situation with which this Court was faced in *Schlanger*, and the Court's holding, equally applicable to the present case, is unmistakable: where the district court "has no custodian within its reach against whom its writ can run," that absence is "fatal" to the court's habeas corpus jurisdiction (401 U.S. at 491).

The requirement that there be a custodian within the court's territory reflects the fact that the writ is operative against the custodian alone. The court can grant effective relief only if it is able to compel the custodian to obey its mandate, and that in turn depends on the custodian being physically present in the district. Petitioner's suggested "presence-through-contacts" theory has no application to the requirement of a custodian for habeas corpus jurisdiction. Nor does the general venue provision in 28 U.S.C. 1391(e) modify the jurisdictional prerequisites for habeas corpus.

The judicial district in which deferred reservists like petitioner must commence a habeas corpus action is where their custodian—the RCPC Commander—is located. There is no jurisdictional impediment to bringing suit in that district if petitioner is actually present at that place when the action is filed, since the requisites for habeas corpus (custody and custodian) would then be met. Nor would this pose any real hardships for petitioner. He and his counsel could travel to the RCPC quickly and without undue expense, and would not need to stay there. Litigation time would be no greater there than in any other district. This requirement would not significantly increase the caseload in the judicial district where the RCPC is situated, in view of the small number of conscientious objector applications by non-unit reservists that are rejected.

## II

None of the other statutes urged by petitioner provides an appropriate basis for this suit.

The requirements for an action "in the nature of mandamus" under 28 U.S.C. 1361 are not present here. Petitioner has not shown that he has a clear right to the relief he seeks or that the Army is under a clear duty to discharge him. Quite the contrary, the military's decision denying him conscientious objector status on the basis of appropriate legal standards and factual information calls for precisely the type of exercise of discretion and judgment that precludes relief by way of mandamus. And the writ of mandamus is not available where another alternative remedy exists, such as petitioner had here by a habeas

corpus suit in a proper jurisdiction. At all events, the relief that petitioner is seeking—discharge from the Army—cannot be obtained by mandamus in this situation.

The remaining provisions on which petitioner relies are not appropriate bases for a court to exercise jurisdiction. By its terms, the Administrative Procedure Act is not applicable here. It permits review only if there is "no other adequate remedy in a court" (5 U.S.C. 704), and that is not so in the instant case because a habeas corpus suit is available in the district court where the RCPC is located. It is proper for district courts located elsewhere to decline to exercise jurisdiction under Section 1331(a) on this same ground, especially where, as in this case, the only relief sought is discharge from the military.

## ARGUMENT

### I

### THE CALIFORNIA DISTRICT COURT LACKS HABEAS CORPUS JURISDICTION BECAUSE PETITIONER HAS NO CUSTODIAN WITHIN THAT COURT'S JUDICIAL DISTRICT

The habeas corpus jurisdictional issue in this case is quite narrow. In our view, it is essentially the same question as that which the Court considered this past Term in *Schlanger* v. *Seamans*, 401 U.S. 487. Here, as in *Schlanger*, we do not dispute that petitioner is "in custody" as that term is used in the habeas corpus statute (28 U.S.C. 2241), since, as a reserve officer, he is subject to military orders and control which act as a restraint on his freedom. See *Hammond* v. *Lenfest*, 398 F. 2d 705 (C.A. 2); *Silberberg* v. *Willis*, 420 F.

2d 662 (C.A. 1); *Bohnert* v. *Faulkner*, 438 F. 2d 747 (C.A. 6); *Arlen* v. *Laird*, C.A. 2, No. 71–1446, decided October 28, 1971; *Meck* v. *Commanding Officer*, C.A. 3, No. 19,276, decided November 22, 1971; cf. *Jones* v. *Cunningham*, 371 U.S. 236, 240; *Gillette* v. *United States*, 401 U.S. 437, 440 n. 2.[6] Nor do we in this Court dispute that non-unit reservists with deferred active duty obligations, like petitioner, are in custody within the district where they reside pursuant to Army authorization. See the opinion below (App. 73); *Schlanger*, *supra*, 401 U.S. at 491.[7] The only issue

[6] Various district courts have held that the restraints imposed by the military on a reserve officer like petitioner, with a deferred active duty obligation (see n. 1, *supra*), are sufficient to satisfy the "in custody" requirement for issuance of habeas corpus. See, *e.g.*, *Nason* v. *Secretary of Army*, 304 F. Supp. 422, 424 (D. Mass.); *Donigian* v. *Laird*, 308 F. Supp. 449, 451, 452 (D. Md.); *United States ex rel. Armstrong* v. *Wheeler*, 321 F. Supp. 471, 474 (E.D. Pa.).

[7] The district courts are empowered to issue writs of habeas corpus only "within their respective jurisdictions" (28 U.S.C. 2241). This phrase limits the habeas corpus jurisdiction of the district courts "to inquiries into the causes of restraints of liberty of those confined or restrained within the territorial jurisdiction of those courts." *Ahrens* v. *Clark*, 335 U.S. 188, 190. Thus, a district court has jurisdiction to issue a writ of habeas corpus only if the petitioner is detained within the boundaries of its district. *Whiting* v. *Chew*, 273 F. 2d 885 (C.A. 4); *Webb* v. *Beto*, 362 F. 2d 105 (C.A. 5); *United States ex rel. Van Scoten* v. *Commonwealth of Pennsylvania*, 404 F. 2d 767 (C.A. 3); *George* v. *Nelson*, 410 F. 2d 1179 (C.A. 9), affirmed on other grounds, 399 U.S. 224; but see *Word* v. *North Carolina*, 406 F. 2d 352, 358–361 (C.A. 4). Compare *United States ex rel. Meadows* v. *State of New York*, 426 F. 2d 1176 (C.A. 2). The jurisdictional principle of *Ahrens* is fully applicable in the military context. See, *e.g.*, *United States ex rel. Rudick* v. *Laird*, 412 F. 2d 16 (C.A. 2), certiorari denied, 396 U.S. 918; *Jarrett* v. *Resor*, 426 F. 2d 213 (C.A. 9).

presented here relates not to the bounds of custody but to the absence of a custodian, and the crucial question is whether reservists like petitioner can bring a habeas corpus suit for release from the military in a court which does not have within its judicial district their commanding officer.

A. THE CALIFORNIA DISTRICT COURT LACKS JURISDICTION TO ENTERTAIN A HABEAS CORPUS ACTION BECAUSE NO "CUSTODIAN" IS PHYSICALLY PRESENT WITHIN THE COURT'S JURISDICTION

The physical presence of a custodian within the territorial jurisdiction of the court is an essential element of jurisdiction to issue habeas corpus. As this Court said in *Schlanger* v. *Seamans*, 401 U.S. 487, 491, there must be a "custodian within * * * [the district court's] reach against whom its writ can run * * *, the absence of [which] * * * is fatal to the [court's habeas corpus] jurisdiction * * *." See also *Ex parte Endo*, 323 U.S. 283, 306–307; *Jones* v. *Cunningham*, *supra*, 371 U.S. at 244; *United States ex rel. Keefe* v. *Dulles*, 222 F. 2d 390 (C.A.D.C.), certiorari denied, 348 U.S. 952; *United States ex rel. Rudick* v. *Laird*, 412 F. 2d 16 (C.A. 2), certiorari denied, 396 U.S. 918; see also *Ahrens* v. Clark, 335 U.S. 188, 198–205 (Rutledge, J., disenting). Unles this jurisdictional requirement is met, the court is powerless to issue a writ of habaes corpus since it is a "restriction * * * which Congress has placed on the power of the District Court to act" (*Ahrens* v. *Clark*, *supra*, 335 U.S. at 193). That Congress has intended to impose this limitation on jurisdiction is clear both from this

Court's interpretation of the import of earlier statutes, *Wales* v. *Whitney*, 114 U.S. 564, 574, and from the language of the present provisions, especially Section 2243 of Title 28 which specifies that the writ of habeas corpus "shall be directed to the person having custody of the person detained." [8]

In this suit, this jurisdictional requirement is not met. The respondents are (1) the Secretary of Defense, (2) the Secretary of the Army, (3) the commander of the Sixth United States Army, (4) the commander of Fort Ord, California, and (5) the RCPC commander at Fort Benjamin Harrison, Indiana. Although the commanders of the Sixth Army and of Fort Ord were physically present within the North-

[8] There has developed recently in the criminal law area a division among the circuits over the question whether a prisoner "in custody" in one judicial district, who seeks to challenge an outstanding detainer filed against him in another jurisdiction, may proceed by way of habeas corpus where he is confined, or should institute his suit in the judicial district in which the detainer is filed. Compare *United States ex rel. Van Scoten* v. *Commonwealth of Pennsylvania*, *supra*, with *Word* v. *North Carolina*, *supra*. We note, however, that where a prisoner had heretofore been permitted to proceed with such a suit in the jurisdiction of confinement, it has been only because the outstanding foreign detainer allegedly has an adverse effect on his present "custody"; it is thus the behavior of the present "custodian" that is in fact being challenged and suit is being maintained where he is located. See *George* v. *Nelson*, *supra*. Similarly, where the habeas corpus suit has been permitted in the jurisdiction in which the detainer was filed (although there was arguably no present "custody" there), the decision focused on the fact that it was there that the custodian under the outstanding detainer could be found. See *Word* v. *North Carolina*, *supra*, 406 F. 2d at 360; *United States ex. rel. Meadows* v. *State of New York*, *supra*.

ern California judicial district[9] when this action was commenced, neither had command authority over petitioner. The Sixth Army commander, though he was area commander in California, had jurisdictional control only over those reservists who did not have the special non-unit, deferred status enjoyed by petitioner (see AR 601–25, Appendix, *infra*, pp. 44, 48, 54). He had no authority over non-unit reservists; they were not subject to his orders, were not under his supervision, and were not required to report their activities to him.[10]

Similarly, petitioner was not under the command authority of the Commanding General at Ford Ord. Even when petitioner visited that base for the interviews in connection with processing his conscientious objector discharge application, he was not subject to military orders of the base commander. He was at Fort Ord for his own purpose and convenience. Indeed, at that time his relationship with the Fort Ord commander was essentially no different from Sgt.

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[9] The commander of the Sixth Army has his headquarters at San Francisco, and the Fort Ord commander is located at the base, near Salinas, California.

[10] Petitioner speculates (Br. p. 35) that the area commander did have authority to place him under military arrest if he "disobeyed an order issued from the Center in Indiana." However, such authority would arise only if an arrest order was given by the officer having "jurisdictional control" over petitioner, *i.e.*, the commander at RCPC. In such an event, presumably he would be subject to arrest wherever he was found. But the arresting officer would not be his "custodian" until the arrest occurred. See, *e.g.*, *Meck* v. *Commanding Officer*, *supra*. Under petitioner's view, the potential authority to arrest a serviceman for disobeying orders would make an area commander "custodian" for habeas corpus purposes over all servicemen within his territory, irrespective of their assigned units.

Schlanger's relationship with the ROTC commander at the University of Arizona during the period he was attending classes there under a separate Air Force program. See *Schlanger* v. *Seamans, supra,* 401 U.S. at 488–489. Moreover, petitioner's suit does not relate to any "custody" to which he might have been subjected at Fort Ord—any such custody ended long ago—but instead to his continued supervision by the RCPC at Fort Benjamin Harrison.

The fact is that petitioner was never assigned to any unit or any commander in California. He traveled there instead on his own, following completion of the graduate program (law school) for which he had obtained the deferral of his active duty obligation. His active duty, which normally would have started promptly upon graduation (see AR 601–25, para. 2–10a, Appendix *infra.* p. 53), was delayed at his request, so that he could take, and retake, the bar examination. And his stay there was certain to be only temporary, as he was under orders to report for active duty in Georgia virtually from the time he left law school and throughout his stay in California. Neither of the California commanders named as respondents had custody or control over him during any of this period.

The other three named respondents did not reside in the judicial district in which petitioner filed suit. The Secretary of Defense and the Secretary of the Army are both located in Washington, D.C., and thus are not within the court's territory. Furthermore, while either could be said to have nominal custody

and control over petitioner, at least insofar as each bears the ultimate responsibility for all those under his command, neither is a proper "custodian" for purposes of habeas corpus jurisdiction. See *United States ex rel. Rudick* v. *Laird, supra,* 412 F. 2d at 21; *Donigian* v. *Laird, supra,* 308 F. Supp. at 452. Rather it is the most immediate commander within the chain of command against whom the writ must issue. Cf. *Schlanger* v. *Seamans, supra,* 401 U.S. at 488.

Colonel John H. Hoffman, the RCPC Commander at Fort Benjamin Harrison, Indiana,[11] is the only proper respondent "custodian" for purposes of habeas corpus. It is he who had "jurisdictional control" over petitioner (AR 601–25, Appendix, *infra,* pp. 48, 54–56); he retained petitioner's military records, granted or denied his requests for further postponements from active duty, and ultimately issued the activation orders. In short, whatever the authority exercised over petitioner by the military, the RCPC Commander was alone responsible. Consequently, the only court competent to issue a writ of habeas corpus was the one within whose territorial limits Colonel Hoffman was.

[11] Due to the transfer of all records at Fort Benjamin Harrison to the United States Army Reserve Components Personel and Administration Center located in St. Louis, Missouri (n. 2, *supra*), petitioner is no longer under Colonel Hoffman's command. Rather, his immediate commander would now be Brigadier General Probst, the commander in St. Louis.

B. PETITIONER'S STATUS AS A DEFERRED SERVICE RESERVE OFFICER DOES NOT ALTER THE REQUIREMENT OF A CUSTODIAN'S PRESENCE IN THE COURT'S JURISDICTION OR RENDER THE HOLDING OF *SCHLANGER* V. *SEAMANS* INAPPLICABLE

Petitioner urges that for a number of reasons the ruling in *Schlanger* is inapplicable to deferred service reserve officers like himself. In our view, petitioner's assertions do not touch on the real basis of the *Schlanger* decision.

1. In *Schlanger*, just as in the present case, the petitioner's commanding officers were neither residents of the judicial district in which he brought suit nor amenable to the district court's process for habeas corpus purposes. In these circumstances, the Court explained, "[t]he question * * * is whether any custodian or one in the chain of command, * * * must be in the territorial jurisdiction of the District Court" (401 U.S. at 489). The Court's holding is unmistakable—where the district court "has no custodian within its reach against whom its writ can run," that absence is "fatal to the jurisdiction" of the court (*id.* at 491).

Since that is precisely the situation in the present case, the court of appeals correctly held that *Schlanger* "compels" the conclusion that the district court below had no jurisdiction to consider petitioner's habeas corpus claim (App. 73). Accord, *Berman* v. *Resor*, C.A. 9, No. 71-1528, decided July 8, 1971, petition for

a writ of certiorari dismissed, No. 71–205, November 10, 1971; *Lipinski* v. *Resor,* C.A. 1, Misc. No. 490, motion for stay and injunction pending appeal denied, July 14, 1971; cf. *Robin* v. *Hoffman,* C.A. 3, No. 71–1581, motion for temporary restraining order pending appeal denied, July 2, 1971; *Smith* v. *Cambell,* C. A. 9, No. 71–1443, decided October 11, 1971; *Meck* v. *Commanding Officer, supra; Still* v. *Commanding Officer,* N.D. Ala., Civil Action No. 71–616, decided November 17, 1971; but see *Arlen* v. *Laird, supra.*

2. Petitioner urges that there are significant differences between deferred reservists and servicemen on active duty, such as Sgt. Schlanger. He points out that he has never been a member of a functioning military unit or physically present at his command unit (the RCPC), and asserts that habeas corpus jurisdiction in California would not deprive the Army of his services by altering his active duty obligations (Br. 17–18). He also claims that the hardships that the *Schlanger* rule would cause a deferred reservist, as well as other policy and practical considerations, militate against applying it to such persons (*id.* at 19, 39–46).

But these considerations do not relate to the location of petitioner's custodian or affect the statutory requirement that there be a custodian within the district court's territory. This prerequisite for habeas corpus jurisdiction reflects the fact that the writ is operative against the custodian alone, against whom Section 2243 requires that it be directed. Accordingly, effective relief depends upon the court's ability to

compel the custodian to obey its mandate; in short, there must be a custodian within the court's reach "against whom its writ can run" (*Schlanger* v. *Seaman's supra,* 401 U.S. at 491) since Congress has not given the district courts the power to enforce the writ outside the limits of their respective judicial territories. See *Ex parte Endo, supra,* 323 U.S. at 306; *Ahrens* v. *Clark, supra,* 335 U.S. at 195–197 (Rutledge, J., dissenting). Petitioner's policy arguments, even if more persuasive than we consider them to be (see pp. 24–27, *infra*), could not serve to broaden the strictures that Congress has thus placed on habeas corpus jurisdiction. Compare *Ahrens* v. *Clark, supra,* 335 U.S. at 192–193.

The Second Circuit in *Arlen* v. *Laird* mistakenly read *Schlanger* as reserving decision on the "precise question" (slip op. at 227) raised by this case. The court in *Schlanger* did not intimate any exception to the requirement that a custodian must be present within the jurisdiction.[12] And the "presence-through-

[12] The *Arlen* court said (slip op. at 227):

> *Schlanger,* as we view its holding, does not preclude a district court, with jurisdiction over the territory in which an unattached reservist is in custody and in which he resides and works, from entertaining his petition for *habeas corpus* solely because his nominal "commanding officer" is not physically present in the jurisdiction. The Supreme Court reserved decision on this precise question, 401 U.S. at 489, 491 n. 5, and cited, apparently with approval, *Donigian* v. *Laird* * * *.

In fact, the Court's comments in *Schlanger* did not relate to the presence of a custodian, but instead concerned "only * * * the question whether such [habeas corpus] applicant can be said to be in custody" (*Lipinski* v. *Resor, supra*).

contacts theory" suggested by petitioner (Br. 31), on which the *Arlen* court apparently relied, has no application to habeas corpus jurisdiction, since the respondent's actual presence is essential to the effectiveness of the writ.[13]

Petitioner argues that the Court's emphasis in *Schlanger* on the presence of a custodian indicates only a concern that the district court have jurisdiction over the person of the custodian. The single requirement for subject matter jurisdiction, his argument goes, is custody within the court's territorial district. Under this view the only question with respect to a custodian is merely one of "personal jurisdiction"—whether a proper custodian is amenable to process in the district court. Petitioner urges that the court could obtain jurisdiction over his custodian under 28 U.S.C. 1391(e).[14]

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[13] The contacts theory of jurisdiction has evolved in a context bearing no resemblance to the present case. In *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, and *International Shoe Co.* v. *Washington*, 326 U.S. 310, this theory was invoked to permit a plaintiff to obtain a judgment against a defendant in a jurisdiction where the defendant, though not physically present when suit was brought, had had substantial contacts. The fact that judgment was entered against the defendant did not, by itself, have any effect on him; the court was powerless to order execution on the absent defendant, and enforcement of the judgment required an order from a court where he (or his property) was located. In the habeas corpus area, by contrast, a judgment is not of any use; the whole purpose of the writ is to control the respondent, by being able to compel him to act, which in turn requires that he be physically within the court's reach.

[14] In effect, petitioner seeks a rule that would entitle reservists on deferred status to assert habeas corpus claims wherever

The basic premise on which this argument rests is, of course, contrary to the holding of *Schlanger* that the requirement that a person having immediate custody over the petitioner must be within the court's judicial district is a fundamental prerequisite for habeas corpus jurisdiction (401 U.S. at 491). Nor can this holding be explained away as simply dealing with personal jurisdiction. Instead, its plain import is "that absence of any custodian or commander results in a lack of jurisdiction over the subject matter of a *habeas* petition * * *." *Still* v. *Commanding Officer, supra,* slip op. at 3. *Schlanger* rejected any notion that Section 1391(e), a general venue statute, modifies the jurisdictional requirements for habeas corpus (see 401 U.S. at 490, n. 4).[15]

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they reside. In a real sense, such persons are in much the same situation as an active duty serviceman "on leave", who is permitted to bring suit only in the district where his commanding officer is located. See, *e.g.*, *United States ex rel. Rudick* v. *Laird*, *supra; Jarrett* v. *Resor*, *supra*. The analogy is especially fitting here. Petitioner had completed his schooling in Connecticut, for which the Army had deferred his active duty, and was in California, on his own, for only a brief period while awaiting the date set for activation. There is no indication that he could not have gone to or lived in any state or number of states, without Army permission, during this time. Moreover, his final destination and active duty date were fixed, by reason of the activation orders that he was under virtually from the time he left law school to report for active duty in Georgia. In all these respects, petitioner's situation was much like the furloughed soldier.

[15] As the Court observed in *Schlanger* (401 U.S. at 490, n. 4), Section 1391(e) "was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia." There has never been any such limitation, however, on habeas corpus actions, which could be brought

The cases petitioner cites for the proposition that Section 1391(e) can be used "once subject matter is found to exist" (Br. 33) are not applicable here. To be sure, where "the petitioner and his custodian * * * were within the territorial jurisdiction of the district court at the time the petition for writ of habeas corpus was filed," the district court may have habeas corpus jurisdiction even though the custodian subsequently leaves the territory. *Smith* v. *Campbell, supra,* slip op. at 8; see also *Ex parte Endo, supra,* 323 U.S. at 305–306; *Jones* v. *Cunningham supra,* 371 U.S. at 243–244. But the absence of petitioner's custodian kept the court below from ever having subject matter jurisdiction over petitioner's suit.[16]

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against appropriate custodians in federal district courts throughout the country; thus, Section 1391(e) is not needed in habeas corpus proceedings, and nothing in the legislative history of that section suggests that it was intended to apply to such proceedings or to "extend habeas corpus jurisdiction" (*ibid.*). See *Lipinski* v. *Resor, supra; Still* v. *Commanding Officer, supra.* The explicit reference in the venue legislation to the Federal Rules of Civil Procedure—which at that time expressly excluded habeas corpus proceedings from their reach (Rule 81(a)(2), Fed. R. Civ. P.)—reinforces this reading. See *Harris* v. *Nelson*, 394 U.S. 286, 294.

[16] Petitioner's further claim (Br. 34–35) that the requisite jurisdiction over his custodian can be established here by asserting jurisdiction over his custodian's "agent" in California, the commander of the Sixth Army, is insupportable. As we have pointed out, the Sixth Army commander was never in petitioner's chain of command, and thus is not himself a proper respondent; and petitioner's complaint does not relate to any "custody" that that officer may have asserted as agent for petitioner's real custodian, the RCPC commanding officer. See pp. 13–15, and n. 10, *supra.*

3. As we have discussed, the judicial district in which a deferred reservist must commence his habeas corpus action is the one where his custodian is located, *Schlanger* v. *Seamans, supra,* in this case the district where the RPCP commander is officially resident. Petitioner is mistaken in suggesting (Br. 19–20, 36–38, 45–46) that there is any jurisdictional impediment to deferred reservists such as petitioner bringing a habeas corpus action in that judicial district. Since the "custody" of which such persons complain is not physical confinement or detention, but rather derives solely from the fact that they are subject to certain military orders, the restraint on liberty is felt wherever such persons happen to be. Indeed, petitioner recognizes as much, in pointing out that what really is involved here is a "concept of figurative rather than physical custody," under which "the courts should presume * * * that the confinement exists where the petitioner is located" (Br. 16, 28).

In our view, petitioner, because of his special status as a deferred reservist, would be as much "in custody" where his RCPC commander is, if he was physically present there, as he would be in California when located there. See *Donigian* v. *Laird, supra,* 308 F. Supp. at 451–452; see also *Schlanger* v. *Seamans, supra,* 401 U.S. at 489, 491. Thus, the territorial rule stated in *Ahrens* v. *Clark, supra,* 335 U.S. 190–191, is fully satisfied when a reservist situated like petitioner enters the judicial district in which the RCPC commander is located; at the time that he files his suit, there is a concurrence of "custody" and "custodian"

within the territorial jurisdiction of a single district court.[17]

The hardships which petitioner claims that he would undergo if he is required to litigate his claim where the RCPC is located do not support a different result. The main thrust of petitioner's argument is that it would be more difficult, expensive and time consuming to litigate a case in another state. He could, however, make a trip by plane from his home in California to Indiana (or Missouri) in a matter of hours. Moreover, while this would entail some expense, we are presumably not confronted in this case with a situation in which the complaining reservist is unable to afford the plane fare; petitioner has alleged in his amended complaint (App. 33) that his financial situation is such that entry into active military service would result in a loss to him of "the sum or value of $10,000, exclusive of interest and costs." Of course, if petitioner had but waited another four days to commence the present suit, he woud have been transported to Fort Gordon, Georgia, at Army expense, and thus could have brought the present suit there without undergoing any additional expense.[18]

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[17] Some district courts have concluded that a non-unit reservist is "in custody" only where he engages in the activity for which the military defers his active service. See *Nason* v. *Secretary of Army*, *supra*, 304 F. Supp. at 424; *United States ex rel. Armstrong* v. *Wheeler*, *supra*, 321 F. Supp. at 475–476. We believe that position incorrect.

[18] We think that there is little merit to petitioner's assertion that reporting for active-duty before filing suit imposes a "most onerous hardship" because "the reservist wants a judicial ruling on whether or not he has to go on active duty before, not after, he has done so" (Br. 41, 43). The issue here is not whether

There would be no need to employ different counsel in this situation, since existing counsel could, of course, travel to the RCPC as easily as petitioner. Nor would either petitioner or his counsel need actually be at that location except to commence suit or present matters to the court. If petitioner were physically in the district when suit was filed, the habeas corpus requisites would then be satisfied (see pp. 23–24, *supra*); his later absence would not cause the court to lose jurisdiction. See *Ex parte Endo, supra,* 323 U.S. at 306; *Jones* v. *Cunningham, supra,* 371 U.S. at 243–244; *Smith* v. *Campbell, supra*; *Meck* v. *Commanding Officer, supra.*

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petitioner must go on active duty, but whether he is entitled to discharge from the Army; by reason of his earlier commitment through the ROTC program, he became a member of the armed forces, and his activation is nothing more than the inevitable culmination of his prior actions. Though petitioner contends that activation might bring about a conflict between his military duties and his views as a conscientious objector, this, of course, assumes that he in fact qualifies as a conscientious objector. This is an issue which has not yet been resolved. Moreover, if petitioner's duties following activation threatened to impinge unduly on his asserted status, the Georgia district court could provide adequate protections for him in the course of considering his habeas corpus suit, just as the California district court did in the present case.

It is relevant that draftees, who unlike petitioner have not voluntarily undertaken military obligations, cannot obtain judicial review of rejected conscientious objector claims unless they submit to active military duty or risk criminal conviction. Petitioner, who may obtain prior judicial review in the district where the RCPC commander is located, is, in fact, in a much less onerous position.

The time that it would take to litigate a suit in the district where the RCPC is located would be no greater than in any other district. Habeas corpus suits must be processed expeditiously in all federal courts. See 28 US.C. 2243, Appendix, *infra,* pp. 41–42.

*Amici curiae* argue that requiring the suit to be brought at the RCPC would result in "a very significant mushrooming of [the] caseload" in a single judicial district (*Am. Cur.* Br. 5–6). Such a prospect, however, appears unlikely. For, contrary to the reservist statistics provided in the brief of *amici curiae*—which relate to all those in Army reserve status, most of whom already have completed their active duty obligation [19]—the number of reservists in petitioner's status is relatively few. We are advised that, as of December 31, 1971, approximately 13,000 reserve officers have been deferred from active duty to pursue graduate studies. About 10,000 are, like petitioner, deferred under AR 601–25; the remaining 3,000 are med-

[19] Most Army non-unit reservists are servicemen who have completed their active-duty obligation and remain in the military in reserve status. A large percentage of this group is in the Retired Reserves. The remainder are essentially those who are fulfilling their statutory obligation after two years of active duty—generally a six-year commitment—but are not attached to any reserve unit or required to report to any command authority. All are under the jurisdiction of the Army Reserve Components Personnel and Administration Center in St. Louis, Missouri; however, they are assigned to different area "Control Groups" for administrative purposes. Only in the event of a national emergency may they be called to active duty. Should a member of this larger group of non-unit reservists claim conscientious objector status—which rarely, if ever, happens—we would urge that judicial review of his claim be treated in the same manner as petitioner's claim.

ical specialists, deferred under essentially the same procedures under AR 601-26. See *Donigian* v. *Laird, supra.* During 1971, the RCPC processed a total of 84 conscientious objector claims by deferred reserve officers, of which only 39 were denied and thus might have resulted in litigation in the civil courts.

## II

### THE DISTRICT COURT SHOULD NOT REVIEW PETITIONER'S CLAIM ON THE BASIS OF THE OTHER JURISDICTIONAL PROVISIONS WHICH HE ASSERTS.

#### A. MANDAMUS JURISDICTION CANNOT BE INVOKED TO REVIEW A DENIAL BY THE MILITARY OF A CLAIM OF CONSCIENTIOUS OBJECTION.

Petitioner also suggests that he can gain access to the courts in a case of this sort through an "action in the nature of mandamus to compel an officer * * * of the United States or any agency thereof to perform a duty owed to the plaintiff," under 28 U.S.C. 1361. We disagree. A suit challenging the judgment of the military in denying conscientious objector status on the basis of the factual information submitted calls for precisely the type of judicial review of administrative discretion that Congress intended to exclude from mandamus jurisdiction under the 1962 Act.

Section 1361 of Title 28 prescribes that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus * * *" with respect to federal officials and agencies. This provision authorizes federal district courts outside the District of Columbia to review and compel official action on

the same basis as the federal district court in the District of Columbia; it does not enlarge the scope of mandamus relief under the common law writ. *Prairie Band of Pottawatomie Tribe of Indians* v. *Udall,* 355 F. 2d 364 (C.A. 10), certiorari denied, 385 U.S. 831. See H. Rep. No. 536, 87th Cong., 2d Sess., pp. 1–2; S. Rep. No. 1992, 87th Cong., 2d Sess., pp. 2, 4; 107 Cong. Rec. 12157; 108 Cong. Rec. 18783–18784, 20093–20094; see also *Carter* v. *Seamans,* 411 F. 2d 767, 773 (C.A. 5); *Jarrett* v. *Resor, supra,* 426 F. 2d at 216; *McEachern* v. *United States,* 212 F. Supp. 706, 712 (W.D.S.C.); *Guffanti* v. *Hershey,* 296 F. Supp. 553, 555 (S.D. N.Y.)

A mandamus action is available only where "it appears that the claim is clear and certain and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt." *Jarrett* v. *Resor, supra,* 426 F. 2d at 216. And, while mandamus may be used "to require the exercise of permissible discretion," it is not to be invoked to "direct the manner in which discretionary acts are to be performed" (*McQueary* v. *Laird,* C.A. 10, No. 708–70, decided October 21, 1971, slip op. at 7), and cannot be employed "to direct the retraction or reversal of action already taken" in the exercise of judgment or discretion (*Wilbur* v. *United States,* 281 U.S. 206, 218). See *Panama Canal Co.* v. *Grace Line, Inc.,* 356 U.S. 309; *Casarino* v. *United States* 431 F. 2d 775 (C.A. 2); compare *Miguel* v. *McCarl,* 291 U.S. 442. "Generally speaking, before the writ of mandamus may properly issue three elements must coexist: (1) a clear right in the plaintiff to the

relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available." *Carter* v. *Seamans, supra,* 411 F. 2d at 773.

None of those elements is present here. Moreover, the relief sought makes clear that a writ of mandamus was properly denied.

1. Petitioner has not shown that he has a clear right to the relief he seeks or that the Army is under a clear duty to discharge him. He is seeking a discharge from military service on grounds of conscientious objection. Discharge on this ground is afforded only to those members of the armed forces who can demonstrate satisfactorily that their opposition to war is general and not particular (*Gillette* v. *United States, supra,* 401 U.S. at 437), is rooted in conscience and religion (*Welsh* v. *United States,* 398 U.S. 333), is sincerely held (cf. *Witmer* v. *United States,* 348 U.S. 375, 381), and did not become fixed until after receipt of an order of induction (*Ehlert* v. *United States,* 402 U.S. 99).

Whether or not particular individuals qualify for such a discharge turns on a delicate application of the appropriate legal standards to factual determinations that are frequently of great difficulty. Petitioner failed to convince the military that he qualified under the relevant legal criteria. Whether that determination is sustainable under the applicable "basis in fact" review standard is a question on which the courts below disagreed.[20] While that question is not now before this

[20] The district court denied petitioner relief on the merits. In its initial opinion, the court of appeals reversed that decision.

Court, we think that the sharp difference of opinion on the matter by those who have reviewed petitioner's claim indicates clearly that, contrary to his bald assertion, it cannot now be said that he has "a clear right * * * to the relief sought" (*Carter* v. *Seamans, supra,* 411 F. 2d at 773).[21]

Nor, in these circumstances, did the Army violate "a clear duty" by refusing to discharge petitioner. The decision with respect to conscientious objector qualification is not a "ministerial" function to be performed automatically by military personnel. Rather it turns on a careful evaluation of the weight and credibility of the relevant information that is submitted with a discharge application and gathered from a number of sources during the processing of the claim (See AR 135-25). Cf. *Clark* v. *Gabriel,* 393 U.S. 256, 259 (Douglas, J., concurring); *McGee* v. *United States,* 402 U.S 479, 490. The entire procedure in-

[21] Petitioner asserts at one point that "his application was processed in a manner contrary to regulations" (Br. 52). Where the military fails to follow its own regulations in processing a claim made by a serviceman and as a result there is prejudice to the serviceman, the courts have sometimes invoked mandamus to compel that the claim be reprocessed in accordance with regulations. See *Schatten* v. *United States,* 419 F. 2d 187 (C.A. 6); *Feliciano* v. *Laird,* 426 F. 2d 424 (C.A. 2); *Bluth* v. *Laird,* 435 F. 2d 1065 (C.A. 4); see also *United States ex rel. Schonbrun* v. *Commanding Officer,* 403 F. 2d 371, 375 (C.A. 2); *Hancock* v. *Laird,* 415 F. 2d 234 (C.A. 9); *Nixon* v. *Secretary of Navy,* 422 F. 2d 934 (C.A. 2). Petitioner's specific claim in this respect is not set forth, however, nor does he indicate any way in which he was prejudiced because of a procedural irregularity. Moreover, petitioner does not seek the only relief that would be available on a claim of this sort, *i.e.*, reprocessing of his claim in accordance with the regulations; instead he wants to be discharged.

volves precisely the kind of exercise of discretion and judgment that precludes relief by way of mandamus. As the Ninth Circuit observed in *Jarrett* v. *Resor, supra,* 426 F. 2d at 216–217, an assertion that the decision is erroneous on the facts presented "does not allege that * * * [the Army] failed to fulfill a plainly prescribed ministerial duty. It alleges at most that in fulfilling their duty of acting upon his request for discharge from the Army, they either abused their discretion, incorrectly found the facts, or misapplied the law * * *, [none of which supports] invoking jurisdiction under section 1361" (footnote omitted). And see *Guffanti* v. *Hershey, supra,* 296 F. Supp. at 555.

We do not agree with petitioner that the decision respecting mandamus jurisdiction turns on the applicable standard of judicial review of the administrative determination. The nature of the administrative decision under attack is determinative, not the standard of review. It does not follow from the fact that the courts can only look to see whether there exists a "basis in fact" for the military's decision that the decision itself is not of a discretionary nature. Indeed, the very reason for invoking a narrow review standard in cases dealing with claims of conscientious objection is the recognition—both by the courts and by Congress (50 U.S.C. App. 460(b)(3))—that an evaluation of such claims depends in large part on the judgment and expertness of the administrative agency assigned the responsibility of determining in the first instance whether an individual qualifies for exemp-

tion or discharge from military service. The grant or denial of conscientious objector status, grounded on agency judgment and discretion, is not a matter of fulfilling "a plainly prescribed ministerial duty" (*Jarrett v. Resor, supra*, 426 F. 2d at 216).

2. Another remedy is available to petitioner here. He may proceed by way of habeas corpus in the jurisdiction where the RCPC is located while he is not attached to any unit,[22] or in the jurisdiction where his unit is located once he has commenced active duty. It is generally recognized that in such circumstances, courts will not exercise their discretion to issue a writ of mandamus; the writ is an "extraordinary remedy" of limited availability "only in the clearest and most compelling of cases" where no other adequate remedy is available. *Carter* v. *Seamans, supra,* 411 F. 2d at 773. Such is plainly not the case here.

3. At all events, mandamus was properly rejected here because of the relief petitioner is seeking. He claims that the denial of his application for discharge is without basis in fact. If he is right, he would be entitled to be released from the Army, and, indeed, he asked for that relief in the district court (App. 15, 37). Discharge, however "is the office of habeas corpus, not mandamus" and civilian courts will not allow what is in effect a habeas corpus action under

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[22] The possible cost and inconvenience that pursuit of that remedy would entail does not render it inadequate. Compare *Carter* v. *Seamans, supra*, but see *Still* v. *Commanding Officer, supra*. Nor in this case does it seem plausible that litigating the habeas corpus action in a proper court would be significantly more costly or time consuming (see pp. 24–26, *supra*).

the guise of a suit for mandamus. *Gonzales Salcedo* v. *Lauer*, 430 F. 2d 1282, 1283 (C.A. 9). Compare *Ashe* v. *McNamara*, 355 F. 2d 277, 280 (C.A. 1); cf. *Carter* v. *Seamans*, *supra*, 411 F. 2d at 771. The court below correctly pointed out that the only remedy available under mandamus "would not afford complete relief" (App. 73).

B. REVIEW IS NOT AVAILABLE UNDER THE OTHER STATUTES ON WHICH PETITIONER RELIES

Petitioner urged in both courts below that his claims could be considered under the Administrative Procedure Act and under the general federal question jurisdiction of 28 U.S.C. 1331(a). Neither of these statutes provides an appropriate jurisdictional basis for this suit.

1. *The APA.* The Administrative Procedure Act provides for judicial review[23] only where the action complained of is "reviewable by statute" or is final action "for which there is no other adequate remedy in a court" (5 U.S.C. 704). There is no review by statute here, and another adequate remedy (a habeas corpus action in an appropriate jurisdiction) exists. By its own terms, therefore, the APA does not sanction review in the present case.

[23] Whether the APA confers subject matter jurisdiction on the district courts is not settled. While dicta in several decisions of this Court have intimated that the statute might create jurisdiction, there has been no direct holding to that effect. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410; see also *Brownwell* v. *Tom We Shung*, 352 U.S. 180, 185; *Rusk* v. *Cort*, 369 U.S. 367, 371–372; *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141. The courts of appeals are sharply divided.

Petitioner claims that APA review is permissible "as an alternative to habeas corpus, even when the latter remedy is unquestionably available and the more traditional mode of review" (Br. 63). The decision concerning which remedy to use, he asserts, is "primarily for the petitioner to make whenever there are hardship factors associated with one of the remedies" (Br. 64), and, since a habeas corpus suit would be burdensome to him, APA review should be allowed. In effect, his position is that there is "no other adequate remedy," and thus APA review is not barred, whenever a litigant decides it is inconvenient to proceed by habeas corpus.

There is no support for such a construction of the statute in the legislative history. Instead, it was contemplated that the courts would determine whether another remedy existed and if it was adequate. See *Administrative Procedure Act, Legislative History,* 79th Cong., 1944–46 (G.P.O. 1946), pp. 37–38; and see *id.* at pp. 213, 276–277. Of course, that is precisely what happened in the present case; the court of appeals' holding that "habeas corpus in the federal courts" where the RCPC is located is "another adequate remedy" (App. 74), though directed to another question, is equally applicable to the APA inquiry, and indicates that review based on that statute would not be appropriate.

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Though the question need not be decided in this case, since APA review is not available anyway, it is our position that the statute does not create a substantive right to judicial review. See, *e.g.*, *Local 542, International Union of Operating Engineers* v. *National Labor Relations Board*, 328 F. 2d 850, 854 (C.A. 3).

Nor do the decisions of this Court in *Brownell* v. *Tom We Shung*, 352 U.S. 180, and *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, support a different result. Indeed, those cases buttress our position. For, while permitting a challenge to deportation and exclusion orders to be brought in an action under the APA seeking a declaratory judgment, the Court made it clear that review under the APA was available because the claimant did not satisfy the technical requirements for habeas corpus, since he was not in custody. In that situation, no relief could be obtained by means of habeas corpus unless the claimant subjected himself to "the odium of arrest and detention" (*Brownell* v. *Tom We Shung, supra*, 352 U.S. at 183); the Court rejected the argument that the claimant should be forced to do that in order to obtain review, and held that review under the APA would be permitted so that the habeas corpus requisites could be dispensed with. See also *Heikkila* v. *Barber*, 345 U.S. 229, 240 (Frankfurter, J., dissenting).

The question before the Court in *Tom We Shung* and *Pedreiro* was not one of mere convenience to the claimant, but rather whether the claimant could bring a habeas corpus suit at all. Since he could not without being subjected to confinement, APA review was held to be appropriate. Petitioner, on the other hand, is already in custody and he can bring a habeas corpus suit now in the proper forum without subjecting himself to any "detention" that does not already exist. In these circumstances, habeas corpus relief is an available, adequate remedy for petitioner, and review under the APA is therefore precluded.

2. *Section 1331(a)*. Section 1331(a) of Title 28 grants federal district courts "original jurisdiction of all civil actions wherein the matter in controversy exceeds * * * $10,000, * * * and arises under the Constitution, laws, or treaties of the United States." Even if this section provides a basis for subject matter jurisdiction over petitioner's claims,[24] we submit that a court should not invoke such jurisdiction to review the military's decision here.

We recognize that Section 1331(a), unlike the APA, does not limit the review permissible under it to situations where there is "no other adequate remedy in a court." Even so, we believe that the federal courts should be reluctant to entertain an action under Section 1331(a) to review an administrative determination made by the military, when there exists another available forum in which review can be had in a habeas corpus suit. Otherwise, servicemen on active duty, for example, might be able to bring an action under 1331 while at home on leave, rather than, as is required now, filing a habeas corpus case where they are stationed. See *Schlanger* v. *Seamans, supra; United States ex rel. Rudick* v. *Laird, supra; Jarrett* v. *Resor, supra.*

[24] Petitioner asserted federal question jurisdiction under Section 1331(a) and alleged that the requisite jurisdictional amount is at issue (App. 4, 34). No evidence was received on this matter, however, and neither court below discussed it. Thus, the allegations of the complaint on this subject are as yet unproven.

Thus, since deferred reservists can obtain judicial review in a habeas corpus action in the district court where the RCPC is located, other courts should exercise their discretion to decline to accept Section 1331 jurisdiction. This should be especially so where, as in the instant case, the only relief sought is a discharge from the military. Section 1331 has never served as a jurisdictional basis for relief of this sort.[25] Compare pp. 32–33, *supra,* and cases cited there. Here, the court of appeals has, in effect, merely required petitioner to use another available remedy which provides precisely the type of relief he wants, and that decision is correct. Compare *Cortright* v. *Resor,* 447 F. 2d 245, petition for a writ of certiorari pending, No. 71–814.[26]

[25] The relief which petitioner is seeking makes clear that in reality he wants to substitute APA review or declaratory relief under Section 1331(a) for the kind of suit—habeas corpus—by which such relief ordinarily must be obtained. The courts generally have insisted that where habeas corpus relief is asked for, the form of action must be habeas corpus. See *United States ex rel. Bennett* v. *State of Illinois*, 356 F. 2d 878 (C.A. 7), certiorari denied, 384 U.S. 946; *Benson* v. *State Board of Parole & Probation*, 384 F. 2d 238 (C. A. 9, certiorari denied, 391 U.S. 954.

[26] The availability of another remedy distinguishes the present case from the pre-induction review cases on which petitioner relies (Br. 65–66). Those cases involved selective sevice registrants who had not yet been inducted into the military; thus, they were not in custody, and could not test the validity of the administrative action complained of by habeas corpus. Petitioner's situation is, of course, quite different.

## CONCLUSION

For the reasons stated, this Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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FEBRUARY 1972.

# APPENDIX

5 U.S.C. 704 provides:

*Actions reviewable.*

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

28 U.S.C. 1331(a) provides:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1361 provides:

*Action to compel an officer of the United States to perform his duty.*

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. 1391(e) provides:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

28 U.S.C. 2241 provides:

> *Power to grant writ.*
>
> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, any any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

* * * * * *

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. 2242 provides in part:

* * * * * *

If addressed to the Supreme Court, a justice thereof or a circuit judge [the application for a writ of habeas corpus] shall state the reasons for not making application to the district court of the district in which the applicant is held.

28 U.S.C. 2243 provides:

*Issuance of writ; return; hearing; decision.*

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the

writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

Army Regulation AR 601–25 (December 15, 1967, as amended) provides in relevant part:

CHAPTER 2—OFFICERS COMMISSIONED THROUGH THE ROTC PROGRAM—DELAY FROM ENTRY ON ACTIVE DUTY

SECTION I. GENERAL

*2–1. General. a.* The primary purpose of maintaining the ROTC program is to procure commissioned officers to meet the needs of the Active Army and to meet mobilization require-

ments. Officers commissioned through the ROTC program are required to perform an initial period of active duty, or if not needed on active duty, to perform 3 to 6 months of initial active duty for training (ADT) in accordance with the terms of their deferment or contractual agreement.

*b.* This chapter outlines the conditions whereby officers commissioned or to be commissioned through the ROTC program may be eligible to apply for one of the following categories of delay from entry on their initial tour of active duty or ADT.

(1) Category A—Post Graduate Study.

(2) Category B—Professional licensing for specialties allied to the field of medicine.

(3) Category C—Personal or community hardship.

(4) Category D—Initial/seasonal employment and licensing or certification to practice in professional field in other than field of medicine.

*c.* The Department of the Army may suspend the authority to grant delays or may terminate previously granted delays because of overriding military requirements.

*d.* The determination as to whether an officer will serve on active duty or active duty for training upon termination of delay rests with Department of the Army.

*e.* Officers authorized delay to pursue subjects listed in paragraph 2–11(7), (8), or (9) who are detailed to branches indicated therein and who leave school or fail to obtain the degree for which delay was granted will be ordered to active duty or ADT, as appropriate, in the branch in which they were initially commissioned unless they are transferred to a different branch of service.

★*2–2. Scope.* The provisions of this chapter apply to all officers appointed from the ROTC Program to include scholarship and non-scholarship cadets, except as indicated in *b* below.

*a.* Cadets who apply for delay to enroll in approved medical, dental or veterinary schools, or school of osteopathy (para 1–11*h*(3)) to pursue a course of study leading to a degree in medicine, dentistry, veterinary medicine, or osteopathy may be granted initial Category A delay under this regulation. Officers granted delay will be transferred as indicated in paragraph 2–5*b*. These officers will be considered as participants in the Medical Service Early Commissioning Program. Renewal or granting of delay for other reasons will be accomplished as set forth in AR 601–26.

*b.* Cadets, except scholarship cadets, who apply for Category A delay to enroll in an accredited institution (para 1–11*h*(3)(*e*)) to pursue Religion Theology, subject code 114, AR 680–29 may be granted initial delay under this regulation. Officers granted delay will be transferred as indicated in paragraph 2–5*b*. Renewal or granting of delay for other reasons will be accomplished as set forth in this chapter. Scholarship cadets are not authorized delay to pursue Religion Theology.

*2–3. Responsibilities.* The following commanders are responsible for the administrative actions prescribed in this chapter:

*a.* Area commanders described in AR 140–1 who exercise appointment authority under AR 145–1.

*b.* The Commanding Officer, U.S. Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indianapolis, IN 46249.

SECTION II, DELAY POLICIES, CATEGORIES, ELIGIBILITY CRITERIA AND JURISDICTIONAL CONTROL

*2–4. General. a.* This section explains delay policies, defines delay categories, establishes eligibility criteria for delay, prescribes periods of delay and the responsibilities for jurisdictional control over officers in delay status.

*b. Delay policies.*

(1) An individual may be eligible for delay in reporting for initial period of active duty or ADT if he has been accepted or has reasonable evidence of acceptance for enrollment by an approved and recognized institution of higher education for graduate or professional studies, would suffer undue hardship, or for other cogent reasons authorized in this chapter.

(2) Approval of delay will be based upon the applicant's meeting the eligibility requirements or criteria prescribed for the appropriate delay category and submission of request within the established time frame.

(3) Requests for Category A, B, or D delay submitted after the time frames set forth in this chapter will not be approved, except where the individual was unable to submit his request at the proper time for reasons beyond his control. In this event, the request with complete explanation may be forwarded to CO, USARCPC for final determination.

(4) Officers authorized Category A or B delay will be assigned to USAR Control Group (Officer Active Duty Obligor) until they enter on initial tour of active duty or ACDUTRA, unless sooner separated or reassigned by proper authority.

(5) Requests for initial Category A delay must be submitted on DA Form 591 Application for Initial (Educational) Delay from Entry on Active Duty/ACDUTRA with Supple-

mental Active Duty/ACDUTRA and Reserve Participation Agreement. DA Form 591 must be accompanied by a properly executed supplemental service agreement as follows:

(*a*) DA Form 591A (Supplemental Active Duty/ACDUTRA and Reserve Participation Agreement for ROTC Participants applying for Initial (Educational) Delay from Entry on Active Duty (AR 601–25)). This agreement will be completed by all officers appointed or scheduled to be appointed from the ROTC Program who wish to apply for Category A delay, except as indicated in (*b*) and (*c*) below. Administrative instructions for completing this form and the DA Form 591 are included on the reverse of the DA Form 591A.

(*b*) DA Form 591B (Supplemental Active Duty/ACDUTRA and Reserve Participation Agreement for ROTC Participants Applying for Initial (Educational) Delay from Entry on Active Duty to pursue Course of Study leading to a degree in Medicine, Dentistry, or Veterinary Medicines (AR 601–25)). This agreement will be completed by all officers appointed or scheduled to be appointed from the ROTC Program who wish to apply for Category A delay to obtain a degree in medicine, dentistry, or veterinary medicine. Administrative instructions for completing this form and the DA Form 591 are included on the reverse of the DA Form 591B.

(*c*) DA Form 591C (Supplemental Active Duty/ACDUTRA and Reserve Participation Agreement for ROTC Participants Applying for Initial (Educational) Delay from Entry on Active Duty to Pursue Religious Studies in Preparation for the Ministry (AR 601–25)). This agreement will be completed by all officers appointed or scheduled to be appointed from the ROTC Program who wish to apply for Category A delay to obtain a degree in the

religious field preparatory to entering the ministry. Administrative instructions for completing this form and the DA Form 591 are included on the reverse of the DA Form 591C.

(6) Delay from entry on initial tour of active duty based upon financial or domestic hardship (para 1–12*a*(2)) normally will not be approved. Requests for Category C delay based upon these reasons may be approved only as exception to policy by Headquarters, Department of the Army.

(7) Officers who obtain an additional degree as a result of post graduate studies which is not consistent with the branch of service in which they initially were appointed may be reappointed or transferred to a different and more appropriate branch of service prior to entry on active duty.

*2–5. Category A.* ★*a. Definition.* Category A is an officer who is pursuing graduate or professional studies for the purpose of obtaining an additional academic degree. Initial Category A may be requested to pursue a course of study leading to a degree in medicine, dentistry, veterinary medicine, osteopathy, or optometry (AR 601–26); to pursue a course of study listed in the Medical Science grouping in AR 680–29 that does not lead to a degree in medicine, dentistry, veterinary medicine, osteopathy, or optometry; to pursue religious studies in preparation for the ministry; to pursue legal studies leading to a first degree in law (LLB or JD); or to pursue a masters degree in any other subject discipline. Officers who desire to apply for renewal of Category A delay in order to pursue a doctorate degree may submit an application not earlier than 6 or later than 3 months prior to completion of their original degree objective. Renewals of delays to continue studies leading to a doctorate will be limited in numbers and

fields commensurate with the needs of the Army for junior officers with doctorate degrees.

*b. Jurisdictional control.* Category A officers will be transferred on Special orders issued by the appropriate area commander to USAR Control Group (Officer Active Duty Obligor), USA RCPC, Fort Benjamin Harrison, Indianapolis, IN 46249. EDCSA will be established no later than the 20th of the month in which the delay becomes effective.

*c. Period of delay.* Applicants may be authorized delay for the periods prescribed below, provided they meet the eligibility requirements in *e* below.

(1) *Initial delay.* Period of initial delay may be for the minimum period required, but in no case will the delay exceed 1 year.

(2) *Annual renewal of delay.* Renewal of delay may be granted in increments of 1 year from the date the initial delay terminates, subject to the restrictions in (3) below.

★(3) Maximum period of delay.

(*a*) Officers granted a Category A delay to pursue a course of study leading to a degree in medicine, dentistry, veterinary medicine, osteopathy, or optometry, will be governed by the provisions of AR 601–26.

(*b*) Officers granted a Category A delay to pursue a course of study listed in the Medical Science grouping in AR 680–29 that does not lead to a degree in medicine, dentistry, veterinary medicine, osteopathy, or optometry, and those granted delay to pursue legal studies may be delayed for that period indicated in the initial application as the total period needed to complete the studies to obtain the degree objective indicated by the applicant (section II, DA Form 591), but not to exceed a total of 36 months.

(*c*) Officers granted a Category A delay to pursue religious studies in preparation for the ministry may be delayed for the period required to complete the religious studies.

(*d*) Officers granted a Category A delay to pursue a masters degree in any other subject discipline may be delayed for that period indicated in the initial application as the total period needed to complete the studies to obtain the degree objective indicated by the applicant (section II, DA Form 591), but not to exceed a total of 24 months.

★*d*. Exceptions to maximum period of delay. Exceptions to the maximum period of delay authorized in *c*(3) above may be granted only with the approval of Headquarters, Department of the Army. Requests for such exceptions must include full justification for further delay. Such justification may include, as appropriate, any communications from appropriate officials of graduate school or applicant concerning his degree program and progress, or forecasting remaining period required to complete research or presentation of thesis or dissertation. Officers who experience abnormal difficulty in completing classroom work, experiments, or research because of personal hardship, illness, experiment failure, or for similar reasons, must include substantiating documents from institution officials, family doctor, or minister as appropriate to the circumstances. Request for exceptions which will exceed a total of 12 months will include a résumé of school requirements for the degree for which the individual is enrolled. If the estimated date of completion of studies changes from previously submitted requests for delay, justification for change must be furnished. Officers who desire to apply for renewal of Category A delay in order to pursue a doctorate degree may submit an application not earlier than 6 or later than 3 months prior to completion of their original degree objective. Approval of renewal of delay for his purpose will be based on the overall needs of the service

for junior officers with a doctorate degree in the applicable subject discipline.

*e. Eligibility requirements.* An applicant for Category A delay must meet the following requirements:

(1) Must execute the appropriate Supplemental Active Duty/ACDUTRA Ready Reserve Participation Agreement described in paragraph 2–4*b*(5).

(2) Applicants for initial delay must—

(*a*) Be enrolled, or tentatively accepted for enrollment, as a degree student in the first regular semester or quarter commencing after the date of commissioning as an officer, or the next fall semester or quarter when the course of study is to begin only in the fall semester or quarter (e.g., medical or law school, and the applicant is a midyear appointee); and,

(*b*) Be enrolled to pursue an uninterrupted full-time course of instruction in graduate or professional studies in an approved and recognized institution of higher education for the purpose of obtaining an additional academic degree; and,

(*c*) Submit application within the time frames set forth in paragraph 2–13*a*(1)(*d*).

(3) Applicants for renewal of delay must—

(*a*) Meet the requirements outlined in (2)(*b*) above; and,

(*b*) Be satisfactorily continuing the studies at the same institution, with the same academic major professional field for which initially delayed; and,

(*c*) Submit application within the time frames set forth in paragraph 2–4*b*(5).

*2–6. Category B. a. Definition.* Category B is an officer who has obtained an academic degree in pharmacy or a specialty allied to medicine and must obtain professional license to perform in his branch and specialty.

*b. Jurisdictional control.* Category B officers will be transferred to the jurisdictional control of the CO, USARCPC in the same manner prescribed in paragraph 2–5*b*.

*c. Period of delay.* Delay will not exceed 1 year. Renewal of Category B delay is not authorized.

*2–7. Category C. a. Definition.* Category C is an officer who would suffer extreme personal or community hardship (para 2–4*b*) as a result of entry on active duty at the normally scheduled time.

*b. Jurisdictional control.* Category C officers will remain under the jurisdictional control of the commander approving the delay until they enter on initial tour of active duty or are screened to the Standby Reserve, unless sooner separated.

*c. Period of delay.*

(1) Delay is authorized for a period not to exceed 6 months when the hardship is of a temporary nature and can be alleviated within the period prescribed. Requests for renewal of delay not to exceed 6 additional months may be approved as exception to policy only at Headquarters, Department of the Army.

(2) Delay is not authorized when the hardship condition appears to be of long duration (normally in excess of 1 year) and cannot be alleviated by a temporary delay. Under these circumstances, action will be taken to screen the officer from the Ready to the Standby Reserve in accordance with AR 135–133.

*2–8. Category D. a. Definition.* Category D is an officer who—

(1) Desires to avail himself of the opportunity for seasonal or initial employment, or

(2) Has obtained a degree in a professional field, other than in the fields of medicine, dentistry, or veterinary medicine, and

who is required to undergo State examination for licensing or certification in his professional field.

★(3) Provides documentary evidence indicating that he is an official candidate of a recognized party in a primary election preliminary to running in a general election for the Congress of the United States. Delay to participate in elections for offices other than the Congress of the United States is not authorized.

*b. Jurisdictional control.* Category D officers will remain under the jurisdictional control of the commander approving the delay until they enter on active duty or are sooner separated.

★*c. Period of delay.* Category D delay may be granted in the case of *a*(1) and (2) above not to exceed 6 months from date of graduation and appointment or upon termination of current delay, whichever is the later date. Category D delay may be granted for the reason set forth in *a*(3) above for the period of time necessary to determine the outcome of the primary election and if appropriate may be extended to determine the outcome of the general election. Category D delay *will not* be authorized to permit an officer to participate in preliminary political activities for nomination as an official party candidate. Renewal of Category D delay is not authorized. Officers granted Category D delay who are elected to the Congress of the United States will be immediately transferred to USAR Control Group (Reinforcement), USAAC, St. Louis, Mo. 63132.

*2–9. Category X* is an officer whose Category A, B, C, and D delay has terminated but the officer will not enter on active duty with EDCSA during the same month in which his delay terminated. This is an administrative delay category to be used solely for accounting purposes.

## Section III. Procedures

*2–10. General. a.* Officers commissioned through the ROTC programs each year normally are scheduled for their initial period of active duty or ACDUTRA during the fiscal year following their appointment. A target date of 1 March is established as the date for the issuance of letters of notification to those officers scheduled for active duty upon their graduation and commissioning in May or June of that year. Those officers not selected for active duty will be scheduled for ACDUTRA within the period outlined above.

*b.* To assist in planning active duty schedules and to preclude the unnecessary issurance of letters of active duty notifications, cadets planning to request delay from entry on active duty must indicate their intent as follows:

(1) Cadets who wish to apply for Category A delay will indicate their intent in Item 17, DA Form 1809 (ROTC Graduate Branch Selection Record) prepared in accordance with AR 145–133. The cadet's graduate degree objective and major field of study will be entered in Item 18 "Remarks" on the DA Form 1809.

(2) Cadets wishing to apply for Category B, C, or D delay who do not have sufficent basis at the time of submission of DA Form 1809 to submit a formal request for such delay as set forth in paragraph 2–13*a* (2) will—

(*a*) Submit, 180 days prior to date of graduation and commissioning, a letter indicating intent to apply for delay.

(*b*) Submit the letter to the appropriate area commander.

*c.* Information reported in Items 17 and 18, DA Form 1809 and/or contained in the letter of intent to request delay is informative only

and will be used at area command headquarters to assist in planning active duty schedules. Approval or disapproval of a request for delay will be based upon information contained on the DA Form 591 or formal letter request prepared in accordance with paragraph 2–13.

*2–11. Responsibilities. a.* The area commander exercising appointment authority over ROTC graduates under AR 145–1 is responsible for the actions prescribed below, until such time as the officer enters on his initial tour of active duty; or he is granted a Category A or B delay and he is transferred to the jurisdictional control of the CO, USARCPC; or he is screened to the Standby Reserve; or he is sooner separated.

(1) Maintaining control over the officer, his personnel records and for strength accountability.

(2) Processing all requests for initial delay and making final decisions thereon.

(3) Notifying applicants of decisions on requests for initial delay.

(4) Advising applicants whose initial delay has been approved of their responsibility to report any change which may influence the continuation of their delay to the area command headquarters or to the CO, USARCPC, as appropriate. The following are some of the conditions which are required to be reported:

(*a*) Failure to continue the education for which delay was granted.

(*b*) A move or transfer from the educational institution.

(*c*) Deviation from field of study.

(*d*) Change from full-time to part-time study.

(e) Unsatisfactory grades.

(*f*) Upon attaining postgraduate degree.

(*g*) When conditions for delay no longer exist.

(5) Advising applicants whose Category A delay has been approved that requests for renewal of delay must be submitted in the manner and within the time frame established in paragraph 2–13*b*(1)(*d*).

(6) Insuring that officers retained under their jurisdictional control are scheduled for active duty or ACDUTRA, as appropriate, as soon as possible under termination of delay.

(7) Publishing orders, as required, detailing officers granted initial Category A delay to pursue subjects identified by the following codes in AR 330–330 to MSC branch prior to transfer of the officer to USAR Control Group (Officer Active Duty Obligor), USARCPC:

203—Entimology
205—Parasitology, General
208—Medical Microbiology
420—Public Health Sanitary Engineer
All codes in the Medical Sciences Grouping listed in AR 330–330.

(8) Publishing orders, as required, detailing officers granted initial Category A delay to pursue study in religion—Theology, subject code 114 (AR 330–330) to Staff Specialist Branch MOS 0001 prior to transfer of the officer to USAR Control Group (Officer Active Duty Obligor), USARCPC.

(9) Publishing orders, as required, detailing officer specifically selected by The Judge Advocate General, Headquarters, Department of the Army (AR 601–107) for initial Category A delay to pursue study in General Law, subject code 599 (AR 330–330) to JAGC Branch prior to transfer of the officer to USAR Control Group (Officer Active Duty Obligor), USARCPC.

*b.* The CO, USARCPC is responsible for the actions set forth below until such time as officers under his jurisdictional control enter on active duty or ACDUTRA, or are screened to the Standby Reserve, or are sooner separated.

(1) Maintaining control over the officer, his Military Personnel Records Jacket, U.S. Army (DA Form 201), and for strength accountability.

(2) Furnishing officers necessary forms and instructions for applying for renewal of delay not later than 150 days prior to termination of current delay, and for making final decisions on such requests.

(3) Notifying applicants of decisions on delay requests.

(4) Advising the applicant of continued responsibility, as set forth in *a*(4) above, when delay request is approved.

(5) Insuring that officers are scheduled for active duty or ACDUTRA as soon as possible upon determination of their delay.

*2–12. Reserve participation.* Officers granted delay from entry on initial tour of active duty are neither required nor authorized to participate in Reserve activities, except that officers detailed Staff Specialist may participate in the education and training programs set forth in AR 135–318 for members assigned to Staff Specialist Branch (Divinity Student) MOS 0001. Applications for such training must be submitted under the provisions of AR 135–318 to CO, USARCPC, ATTN: RCPO at least 60 days prior to the training date requested.

*2–13. Applications for initial delay or renewal of delay. a. Applications for initial delay.* Applications must be submitted in three copies as follows:

(1) *Category A.*

(*a*) Submitted by applicant on DA Form 591. Applicant is responsible for submitting the DA Form 591 to the appropriate institution official for verification of enrollment or acceptance for enrollment.

(*b*) DA Form 591 must be accompanied by DA Form 591A, DA Form 591B, or DA Form 591C, as appropriate (para 2–4*b*(5)).

(*c*) DA Form 591 with inclosure will be submitted to the appropriate area commander.

(*d*) Application must be submitted not later than 120 days prior to the date upon which the individual is scheduled to graduate and be appointed.

(2) *Category B, C, or D.*

(*a*) Applications for Category B. C. or D delay will be submitted in letter form in accordance with the format shown in figure 2–1.

(*b*) Applications for Category C delay must be accompanied by documentary evidence substantiating hardship conditions.

★(*c*) Applications for Category D delay based upon initial employment must be accompanied by specific information from the employer. This information must include the general nature of the training program into which the individual will enter upon his employment; the beginning and ending dates of the training course or cycle for which he is scheduled; verification that the training program for which he would be scheduled with subsequent employment will not be available upon his relief from active duty; and, that completion of the training at this time will insure reemployment with the organization upon his relief from active duty. Application for Category D delay to participate in primary elections preliminary to running for election to the Congress of the United States must be accompanied by a signed statement from an authorized representative from a recognized political party that the

officer is an official party candidate. Applications for Category D delay to participate as a candidate in a primary election will be submitted in letter format substantially as indicated in figure 2–1, except paragraph 8 of the format will be modified to read as follows:

"8. I understand that if this delay is approved and I am not elected in the primary or the general election, I am responsible to notify the commander indicated above and I will be immediately available for active duty. I further understand that if I am elected to the Congress of the United States, I will be transferred immediately to USAR Control Group (Reinforcement)."

(*d*) Applications for Category B or D delay must be submitted not later than 120 days prior to the date upon which the individual is scheduled to graduate and be appointed.

(*e*) Applications for Category C delay will be submitted immediately upon the occurrence of the situation which warrants delay.

(*f*) All applications will be submitted to the appropriate area commander.

*b. Applications for renewal of delay.* Applications must be submitted in three copies as follows:

(1) *Category A.*

(*a*) Submitted by the officer on a form prescribed and furnished from the CO, USARCPC.

(*b*) Officer is responsible for submitting the renewal request to the appropriate institution official for verification of continued enrollment.

(*c*) Application for renewal of delay will be submitted to CO, USARCPC.

(*d*) Application for renewal of delay must be submitted not later than 120 days prior to the date upon which current delay is scheduled to terminate.

(2) *Category B.*

(*a*) Applications for renewal of Category B delay submitted as exceptions to policy will be prepared by the officer in letter format.

(*b*) Officer is responsible for including substantiating documentation necessary to support his request.

(*c*) Applications for renewal of delay will be submitted to the area commander or CO, USARCPC, whichever has jurisdictional control over the officer.

*c. Disposition of delay requests.* Applications for initial delay or renewal of delay on which final action has been taken will be distributed and filed as follows:

(1) Original—To be filed in applicant's Official Military Personnel File.

(2) Copy—To be filed in applicant's Military Personnel Records Jacket, U.S. Army (DA Form 201).

(3) Copy—To be returned to applicant.

*2–14. Personnel records. a.* Area commanders accomplishing appointment of ROTC graduates are responsible for initiating personnel records as prescribed in AR 145–10.

*b.* Personnel records of officers remaining under the jurisdictional control of area commanders pending entry on initial tour of active duty or ACDUTRA will be forwarded as prescribed in AR 145–1.

*c.* Personnel records of officers transferred to USAR Control Group (Officer Active Duty Obligor) will be forwarded as follows at the time of transfer:

(1) Official Military Personnel File will be forwarded to the U.S. Army Administration Center.

(2) Military Personnel Records Jacket, U.S. Army will be forwarded to the U.S.

Army Reserve Components Personnel Center.

_____
(Date)

SUBJECT: Application for Delay from Entry on Initial Tour of Active Duty/ACDUTRA

TO: (Commander having jurisdictional control)

1. Request that I be granted a Category ( ) B, ( ) C, or ( ) D delay in reporting for my initial tour of active duty/ACDUTRA for the reasons set forth herein.

2. My reason for requesting delay is: _____

_____

3. The following letters and/or documents are submitted to substantiate my request: _____

_____

4. Delay is requested for a period of _____ months to commence _____19____ and to terminate during _____19_____.

5. I (have) (have not) been granted previous delay. (If granted previous delay, furnish periods of delay and reasons.)

6. I (was) (will be) appointed as a commissioned officer in the USAR by _____

_____
(Area Command Headquarters)

during _____19_____.

7. My address while on delay status will be: _____

_____

Telephone: _____

8. I understand that upon termination of delay, the determination as to whether I serve on active duty or ACDUTRA rests with the Department of the Army and that my delay can be terminated at any time by Department

of the Army because of overriding military requirements.

_____
(Signature)

_____
(Name typed or printed)

_____
(Grade, branch and service No. if appointed)

_____
(Social Security Account Number)

*Figure 2–1.*

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